BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

October 23, 2002

Anthony G. Graham
Graham & Martin LLP
3 Park Plaza, Suite 2030
Irvine, CA 92614

RE: *Coordinated Secondhand Smoke Cases*
JCCP 4182

Dear Mr. Graham:

Recently, we received settlements and Reports of Settlement from your office in a number of the Proposition 65 Secondhand Smoke Cases, between your clients Consumer Defense Group and the McKenzie Group and (1) Hotel Sofitel and Accor North America, Inc., (2) Kintetsu Enterprises Company of America, (3) Wyndham International, Inc. and Patriot American Hospitality, (4) Hilton Hotels Corporation (and related entities), (5) Pacifica Hotel Company, and (6) LaQuinta Corporation (and related entities). These settlements were provided to us pursuant the reporting provisions of Health and Safety Code section 25249.7(f)(2) and 11 CCR section 3003.

Since then, we also received motions for approval of the settlements in the first three matters (Sofitel, Kintetsu, and Wyndham). Apparently, a motion for judicial approval under SB 471 has yet to be filed as to the other settlements. As you know, pursuant to SB 471, any settlement in a private Proposition 65 enforcement action must be submitted to the court by noticed motion, and the settlement may not be approved unless the court finds that: (A) any warning that is required by the settlement complies with Proposition 65; (B) Any award of attorney's fees is reasonable under California law; and (C) Any penalty is reasonable based on specific criteria set forth in the penalty provision of the statute. (See Health and Safety Code § 25249.7(f)(4); Stats. 2001, c. 578 (S.B. 471, § 1.).) The statute also requires that the settlement and all supporting materials be provided to the Attorney General, "who may appear and participate in any proceeding without intervening in the case." (Health and Safety Code § 25249.7(f)(5).) Pursuant to existing regulations at 11 CCR section 3008(b), including the Emergency Regulation readopted on August 29, 2002, any comments by the Attorney General must be provided to the court prior to the hearing on the motion.

Because of the importance of these matters, and their significance in the effort to resolve the large number of pending cases of this type, we have reviewed the terms of all five of these

settlements, even though we do not have moving papers for two of them.[1] Nonetheless, these settlements contain numerous provisions that do not comply with the law. If they are submitted to the court for approval as currently drafted, we will appear in court and oppose their approval. The following sets forth our analysis of the terms of the settlements.

A. Warnings

1. Environmental Exposures

Under the settlements, a warning sign would be posted at entries to the building and the employee bulletin board saying "This Facility Contains Chemicals Known to the State of California to Cause Cancer and Birth Defects or Other Reproductive Harm. Further Information on Specific Chemicals is Provided at the Registration Desk." (Par. 3.1.) No information about the brochure is provided in the settlement.

In addition, if smoking is allowed anywhere on the premises, then where smoking is permitted (including in guest rooms), a sign saying "This Area is a Designated Smoking Area. Tobacco Smoke is Known to the State of California to Cause Cancer and Birth Defects or Other Reproductive Harm" will be posted. Under the settlements, the two types of signs may be combined. No requirements concerning the appearance of these signs are set forth in the agreement.

The use of the "generic" environmental warning sign, "WARNING: This Facility Contains Chemicals Known to the State of California to Cause Cancer and Birth Defects or Other Reproductive Harm" is troubling because of the extent to which it is being used to provide warnings for a variety of possible exposures. Regulations do permit the use of this type of a sign, *but only if certain criteria are met*. These regulations provide that environmental and occupational exposure warnings may be given by posting a sign stating "This area contains a chemical known to the State of California to cause cancer" (or birth defects or other reproductive harm). (22 CCR §§ 12601(c)(1)(B), (c)(3),(d)(1), (d)(3).) For environmental warnings, however, any warning, whether signs, media, or delivered notices, must be provided "in a conspicuous manner and under such conditions as to make it likely to be read, seen or heard, and understood by an ordinary individual in the course of normal daily activity, and *reasonably associated with the source and location of the exposure*." (22 CCR § 12601(d)(2); emphasis added.) Depending on the size, appearance, and exact location of the sign, it may meet the

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[1]As we review the supporting papers, we may find additional matters of concern, particularly concerning whether the attorney's fees are reasonable, which cannot be determined from the face of the settlements.

"likely to be seen" test, but as applied to many of these exposures, it is not "reasonably associated with the source and location of the exposure." Where the sign is posted near a room where smoking is allowed, or near a parking garage where auto exhaust is present, the warning may be reasonably associated with the exposure, because a reader might infer that it relates to chemicals present in the ambient air in that area. That sign, however, is not in any respect associated with the wide variety of exposures purportedly covered by these settlements, including food, cleaning supplies, alcoholic beverages, and pesticides.

The sign would provide that additional information is "available at the Registration Desk," but the settlement provides no requirements for that information. Proposition 65 has never been construed to authorize warning methods for which the consumer actually has to *request* the relevant information. This was litigated extensively with respect to the "800 number" warning format promoted by the "Ingredient Communication Council." In that case, the Court of Appeal held that the warning method must:

> consider the probability of the prospective consumer seeing or hearing the warning message. Availability of the warning message, to be consistent with the Act, must mean more than the possibility a consumer would be apprised of the specific warning message only through considerable effort.

(Ingredient Communication Council v. Lungren (1992) 2 Cal.App.4th 1480. 1494.) Given enough information, we would review the possibility of providing a warning by distributing a handout to all hotel guests (regardless of whether they request it), depending on the contents and appearance of the additional information. These settlements, however, provide none of this information, so they are clearly inadequate.

The tobacco warning sign provided would appear to be adequate for secondhand tobacco smoke, but for the fact that the settlement establishes no criteria for the appearance or visibility of the sign.

2. Other Consumer Product Warnings

As to consumer products, the settlements provide that the defendants have been in compliance, but that they will post warnings for tobacco products at the point of sale stating that "This Product Contains/Produces Chemicals Known to the State of California to Cause Cancer and Birth Defects or Other Reproductive Harm." Tobacco products, including cigars, generally are labeled with warnings that satisfy Proposition 65 requirements for warnings to the consumers of the tobacco product, so the additional sign provided for sales in the hotel gift shop is not needed, unless the products have been removed from their packaging. In those instances, the

sign provided in the settlement could be sufficient for those products, if it is placed so that the reference to "This Product" is understood to mean tobacco products. (Typically, stores posting signs concerning tobacco products use a sign referring to "Cigars and Pipe Tobacco," and occasionally cigarettes or smokeless tobacco.) The settlements, however, provide that this warning statement would be provided not just where tobacco products are sold, but wherever "other products containing Noticed Chemicals are sold." (Par. 3.2.) In addition, unique in the group, the Hilton Hotels settlement does not provide a retail warning sign for tobacco products, but a general warning sign for all products sold in the store:

> Warning: Chemicals Known to the State of California to Cause Cancer and/or Birth Defects or Other Reproductive Harm May Be Present in Products Sold Here.

The general sign proposed by Hilton, in which it is stated that some products in the store "may contain" listed chemicals, has been proposed by industry as a solution since the statute was adopted, and rejected by the lead agency and the Attorney General whenever it has been raised. The somewhat different sign proposed in the other settlements does not identify the products to which it refers, and if it is posted in a store as a general warning about unidentified products in the store, would be inadequate.

Moreover, because all of the settlements assert that compliance with their terms satisfies all duties to warn for the chemicals contained in the notices, they actually purport to extinguish the duty of the hotels to provide warnings for other exposures for which the duty to warn has been clearly established–alcoholic beverages, lead in tableware or crystal (if they are used), smokeless tobacco, or other items.

B. Payments

Each settlement provides that there will be a payment to the plaintiffs, described as "association[s] formed for the purpose of furthering environmental causes." (Par. 5.1.) Each provides that an equal amount will be paid in attorney's fees.[2]

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[2]The amounts vary in the settlements, and are not always clearly set forth in the face of the agreement. The Report of Settlement form, however, lists a "per hotel," amount, however. For example, the Hilton Hotels settlement states that the per hotel amount is $2,000, and the original notice identifies 137 hotels, which would result in a payment of $274,000. In addition, a charitable contribution of $25,000 will be made to the American Cancer Society. The Pacifica settlement is for $1,800 per hotel, with 31 hotels, for a total of $55,800. LaQuinta is for $1,100 per hotel, with 18 hotels, for $39,600. The Kintetsu settlement is a flat $9,250, Sofitel is a flat $5,500, and Wyndham is a flat $55,000.

The title of this section of the settlements is "5. RESTITUTION AND RELIEF." In turn, the title of the paragraph is "5.1 Defendant's Civil Penalties," but the remaining text does not identify the payment as a civil penalty pursuant to Health and Safety Code section 25249.7(b), or as "restitution." The Report of Settlement filed with the Attorney General included these funds in the portion of the form identifying civil penalties. Of course, if the payment is a civil penalty pursuant to Proposition 65, while it could initially be tendered to the plaintiff, 75% of the penalty must be provided to the Department of Toxic Substances Control for disbursement to specified funds used for clean-up of contaminated sites and enforcement activities of local public health officers under Health and Safety Code section 25192. Thus, we cannot determine whether the payment is a civil penalty or another payment to be retained by the plaintiffs. If the payment is specified as a civil penalty, it would be permissible, subject to the required showing that the amount is reasonable based on the penalty factors set forth in the statute.

If these payments are to be retained by the plaintiffs, they do not appear to be appropriate. As you may know, the Attorney General recently proposed regulations establishing settlement guidelines under which such payments would be analyzed as payments in lieu of penalties. While these guidelines have not yet been adopted, they would require that "the funded activities have a nexus to the basis for the litigation, i.e., the funds should address the same public harm as that allegedly caused by the defendant(s) in the particular case." (Proposed 11 CCR § 3202(b)(1).) They also would require that the entity receiving the funds be able "to demonstrate how the funds will be spent and can assure that the funds are being spent for the proper, designated purpose." (11 CCR § 3203(b)(2).)

These proposed guidelines are soundly based on existing law. Any payment collected under the law must in some way be authorized by the underlying statutes or authorities upon which the claim is based, and the relevant authorities in this instance support a nexus requirement. While the fact that a particular form of relief is not authorized by the statute being enforced does not, in and of itself, preclude the court from approving a settlement containing such relief, such payments must further the purpose of the law being enforced. (*Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 116, *Rayan v. Dykeman* (1990) 22 Cal.App.3d 1629, 1634.) Moreover, many of these funds are in effect "cy pres restitution," whether so denominated or not. In that context, the Supreme Court has noted that whether a court will find the funding of an activity proper, "depends upon its usefulness in fulfilling the purposes of the underlying cause of action." (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.) In *Levi Strauss*, the court specifically cautioned against awarding funds to existing organizations because they "may view a large recovery as a pot of gold to fund projects ranked high on the group's own agenda but of little or no benefit to the class." (*Id*., 475, n.11.)

In this instance, simply noting that the plaintiff is "formed for the purpose of furthering environmental causes," does not even purport to restrict the use of the funds in any way. The following paragraph, 5.2, then recites the purposes of the plaintiff organizations somewhat more specifically, but again does not purport to restrict the use of the funds. Moreover, so far as we know, the plaintiffs are not registered as not-for-profit corporations, nor do we have any other description of their status that would enable us to conclude that they are an appropriate, accountable recipient of such funds.

Some of the settlements provide for certain contributions to the American Cancer Society. Even for these contributions, some limitation on the use of the funds should be provided.

We have not yet seen any documentation sufficient to enable us to determine whether the attorney's fees are reasonable, and therefore cannot comment on that issue at this time. We note, however, that the fee is equal to the amount of other recoveries in each case, which will not by itself sufficiently justify the amount of the fee.

C. Claims Covered and Overall Compliance

The settlements provide that posting these warnings "is deemed to fully satisfy [defendant's] obligations under Proposition 65 with respect to any exposures and potential exposures to Noticed Chemicals in all respects and to any and all person(s) and entity(ies). (3.3)

Extensive provisions entitled "4. RELEASE AND CLAIMS COVERED" provide that the settlements resolve all claims based on exposures to the chemicals set forth in the sixty-day notices, both for past relief, and for responsibility to provide warnings in the future. An equally lengthy section entitled "7. PRECLUSIVE EFFECT OF CONSENT JUDGMENT" essentially provides in different language that all Proposition 65-based claims are precluded for all claims referred to in the notice.

The language does not directly state that the People of the State of California are bound by these provisions. As you know, we do not think such a provision is legally proper or enforceable. With respect to the breadth of the provisions, however, our primary concern is that they all are tied to each exposure alleged in the notices of violation, which thereby renders the proper scope of the notices critical to evaluating the effect of the settlement.

D. The Notices

The notices are significant for two particular reasons. First, in any case, valid notices are necessary to give the plaintiff authority to sue and render the settlements valid. (22 CCR § 12903(a); *Yeroushalmi v. Miramar Hilton* (2001) 88 Cal.App.4th 738, 748, n.8.) In these cases, the notices are also significant because the purported preclusive effect of the settlement is defined in the settlement by reference to the chemicals and exposures listed in the notices.

In reviewing notices, we keep in mind that, as the court stated in *Yeroushalmi*, the notices must "state sufficient specific facts to enable the alleged violators and the appropriate governmental agencies to undertake a meaningful investigation and remedy the alleged violations prior to citizen intervention." (*Id*. at 741.) Referring to the plaintiffs' notices as "conclusory, fact-bereft, boilerplate," that court found that notices that "simply regurgitate the language of the regulation, without stating the most basic facts to describe the nature of the violation, cannot be said to provide adequate information to allow the assessment of the nature of the alleged violation." (*Id*, at 750.)

Most critically, for notices alleging consumer product or service exposures, the notice must describe the product or service "with sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged." (22 CCR § 12903(b)(2)(D).) The listed chemical in question must be provided for each product or service. (*Id*.)

These form notices set forth three general categories of exposure (environmental, occupational, and consumer products), and thirteen "detailed" categories of violations. The categories are:

1. Secondhand Tobacco Smoke
2. Cleaning Supplies and Related Activities
3. On-Site Construction Activities
4. Furnishings, Hardware and Electrical Components
5. Personal Hygiene and Medical Supplies
6. Combustion Sources
7. Office and Art Supplies and Equipment
8. Landscaping Supplies and Pesticide Treatment
9. Food and beverage Service
10. Transportation-related Exposures
11. Equipment and Facility Maintenance
12. Recreation, Swimming Pools, Hot Tubs and Beaches
13. Retail Sales

In reviewing the notices, it appears that the identification of tobacco smoke and auto exhaust exposures may be sufficient. The remaining categories are composed of a paragraph-long recitation of every conceivable type of exposure that might occur within a given category–"soaps, shampoos, conditioners and mouthwash," "paints and solvents," "mineral-based fiber boards," "organic fuel sources," "fertilizers and soil amendments," and literally *any* kind of food or beverage. For each category, the notice recites a number of Proposition 65 listed chemicals that may be involved in the exposures. (A total of 52 listed chemicals are identified in a separate attachment.) No specific brand-name products are identified.

With the possible exception of the allegations of exposure to tobacco smoke and auto exhaust, the notices are patently inadequate. The other alleged exposures are not adequately defined. While the notices here are longer and more detailed than those in *Yeroushalmi*, they cover so many possible exposures that few, if any, are identified with sufficient detail to allow any reasonable assessment of the claim. The notice appears to be an effort to describe every imaginable exposure within the scope of Proposition 65 and include it in the notice, without regard to whether the noticing party has any actual basis for making the allegation.

In addition, while the notices in question attach a Certificate of Merit, they included *no* supporting factual information. Proposition 65, as amended by SB 471, requires that the certificate attach "[f]actual information sufficient to establish the basis of the certificate of merit," including "the identity of the persons consulted with and relied on by the certifier, and the facts, studies, or other data reviewed by those persons[.]" (Health and Safety Code §§ 25249.7(d)(1), (h)(2).)

Conclusion

Accordingly, in our view, these settlements cannot be approved by the court because the warnings provided for do not comply with Proposition 65; the payments to be made to the plaintiff are not permissible under Proposition 65 or other law or public policy; and the scope and content of the notices is insufficient to give the plaintiffs the authority to bring an action concerning the vast majority of the exposures alleged in the notices and purportedly resolved by the settlements.[3]

The litigation of these matters has been long, difficult, and expensive, and some form of settlement among the interested parties would be beneficial. The Attorney General is willing to work with all concerned in order to provide any reasonable assistance he can to resolve these claims. If there is anything the Attorney General can do to help bring the parties to a resolution meeting the requirements of the law, please contact the undersigned.

Sincerely,

EDWARD G. WEIL
Supervising Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: B.J. Kirwan
Kurt Weismueller
Malcolm Weiss
Reuben Yeroushalmi
(By facsimile)
All counsel in JCCP 4182
(By mail)

[3]A number of cases brought by the McKenzie Group and Consumer Defense Group concern alleged violations and alleged violators that previously were the subject of notices given by another entity, Consumer Advocacy Group. In this letter, we are not addressing the issue of whether the law gives precedence to either entity.